

1 IBJAAISSL2 Conference

2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
-----x

4 UNITED STATES OF AMERICA,

5 v.

17 CR 74 (CM)

6 IBRAHIM ISSA,

7 Defendant.  
-----x

9 New York, N.Y.  
10 November 19, 2018  
11 11:00 a.m.

12 Before:

13 HON. COLLEEN MCMAHON,

14 District Judge

15 APPEARANCES

16 GEOFFREY S. BERMAN  
17 United States Attorney for the  
Southern District of New York

18 JAMES LIGTENBERG

19 SARAH PAUL  
Assistant United States Attorney

20 BEN BRAFMAN  
Attorney for Defendant Issa

21 JOSHUA KIRSHNER  
Attorney for Defendant Issa

1 (Case called)

2 MR. BRAFMAN: I want to make our morning easier.

3 THE COURT: I want the tank team to put its  
4 appearances on the record again.

5 MR. LIGTENBERG: Jim Ligtenberg and Sarah Paul, for  
6 the government.

7 THE COURT: Great. Good morning.

8 OK. Mr. Brafman, you want to make my morning easier?

9 MR. BRAFMAN: Yes. We've provided you with the book  
10 with exhibits stamped one through 72. I don't think that any  
11 of them in our judgment are going to be controversial. I do  
12 want to refer your Honor to the Court's order of findings of  
13 fact dated November 16, 2018, because before we do that we need  
14 to I think amend one fact that your Honor found and I'll be  
15 brief.

16 THE COURT: You may want to amend one fact that I  
17 found. I may not want to amend one fact.

18 MR. BRAFMAN: I want to call it to your attention.

19 THE COURT: I don't have a copy of it. I need to open  
20 it. Thank you. As you might imagine, it had not been my  
21 attention to write. Then about two o'clock Friday afternoon I  
22 said that I won't be fair but I did. That document came into  
23 very quickly on Friday afternoon.

24 All right. What would you like me to change?

25 MR. BRAFMAN: Refer to paragraph 18 of the document of

1 the order, "findings of fact".

2 THE COURT: Yes.

3 MR. BRAFMAN: You say at some point between May 27 and  
4 June 10, 2014, most likely at the meeting referred to in Grand  
5 Jury Exhibit A, as Government Exhibit A that's occurred next  
6 week doing the first week of June, the decision was made that  
7 First Star would indeed file an amended tax return.

8 I believe that has to be pushed out to August 13.

9 THE COURT: No.

10 MR. BRAFMAN: Let me just show your Honor one exhibit  
11 that we're going to discuss today and you'll see why.

12 THE COURT: But you didn't introduce it at the  
13 hearing.

14 MR. BRAFMAN: We did, your Honor. Defendant's exhibit  
15 12 at the hearing, it was introduced.

16 THE COURT: OK. Yes.

17 MR. BRAFMAN: There's still on August 13, discussing  
18 with the Kovel accountant the discussion to decision to amend  
19 and just being told we do not have to file a petition in tax  
20 court. The deadline for a filing an amended return is March  
21 15th. I think we should meet with Paul to go over the amended  
22 return. So clearly on August 13 --

23 THE COURT: No. That's not how I read it at all  
24 because let's read the whole series. The whole series of  
25 e-mails that are Exhibit 12, starting with the first e-mail on

1 July 10, these are all e-mails where they are, where Daniela  
2 Silva is providing Mr --

3 MR. BRAFMAN: "Tsamulatis".

4 THE COURT: Mr. Tsamulatis with materials for the  
5 corporate tax return. Most of them are headed "corporate tax  
6 return". They are all about materials or corporate tax  
7 returns. They are not copied to Mr. Ambrose. He is not on any  
8 of those e-mails. And of course corporate tax return 86, we're  
9 still trying to get them. How are we being to do the  
10 bookkeeping without the years of information back up?

11 August 11 says: Hi Chris. The due date to send the amended  
12 tax return is 8/17/14.

13 The decision had clearly been made and the August 13th  
14 e-mail that's copied from Chris that's copied to Ambrose said,  
15 I just spoke to Paul. He informed me he received a response.  
16 He does not have to file a petition in tax court.

17 So Mr. Ambrose had obviously asked the IRS if it was  
18 necessary to file a petition in tax court since they were  
19 planning to file an amended return. That's how I read it. Had  
20 you asked questions of Mr. Ambrose, he might have disabused me  
21 of that notion but I doubt it. That does not mean that the  
22 decision had not already been made. This was about filing a  
23 petition in addition to an amended return.

24 MR. BRAFMAN: But the amended return had not been yet  
25 finalized for filings. That's the crime.

1                   THE COURT: You have your exception. Tell the fell  
2 the Court of Appeals if you are unlucky enough to get there  
3 that I was wrong and that the real decision to file an amended  
4 tax return was not made in the first week of June but in the  
5 second week of August. Go right ahead. You have that argument  
6 preserved for you for your appeal. I will not be changing my  
7 finding. I read this stuff too.

8                   MR. BRAFMAN: I understand.

9                   THE COURT: OK.

10                  MR. BRAFMAN: Your Honor, I want to begin if I can,  
11 you asked us to identify. We have prepared a notebook to make  
12 it easier. So a copy has been given to the government. But I  
13 have a preliminary question. There are a series of e-mails  
14 that are merely communications trying to set up meetings with  
15 Mr. Ambrose and Mr. Tsamulatis. And I am not certain whether  
16 it matters in the final analysis but they are meetings which  
17 would be, I think, represent decisions by Mr. Issa to hire an  
18 accountant and a criminal lawyer, and I think those should be  
19 suppressed as well.

20                  THE COURT: Can we go through these  
21 document-by-document, please? That's the only thing I want to  
22 do. I don't have time to do anything else.

23                  MR. BRAFMAN: Document One, Exhibit One --

24                  MR. LIGTENBERG: If I may, your Honor? The government  
25 is willing to agree on one through 19.

1 MR. BRAFMAN: I'm sorry?

2 THE COURT: One through 19 fall within the Kovel  
3 privilege.

4 MR. LIGTENBERG: Yes, your Honor.

5 THE COURT: Great. I like that. So one through 19  
6 we're all agreed, fall within the Kovel privilege and the  
7 government will argue as to -- I don't know -- some or all of  
8 them, that they fall within the crime fraud exception. The  
9 government needs to identify for me and for Mr. Brafman whether  
10 there are any e-mails in those 19 sets of e-mails or any  
11 documents that, as to which it will say the crime fraud  
12 exception does not apply.

13 MR. LIGTENBERG: Your Honor, we will take a look and  
14 enlighten the Court.

15 THE COURT: Please do that by the end of the day. I  
16 don't want Mr. Brafman punching in the dark any more.

17 OK. So we're all the way up to 20.

18 MR. BRAFMAN: So 20, your Honor, is an e-mail dated  
19 May 21. The subject is corporate taxes under Ibrahim Issa's  
20 name. I understand that there are other corporations in play.  
21 But this includes, obviously, the one document that's charged  
22 in the indictment which is the 2012 return. And the fact that  
23 it's labeled plural should not be the end of the discussion.  
24 The Court's required to apply discretion and common sense when  
25 you are talking to an accountant at the beginning and can't be

1 bound by how someone labels on e-mail.

2 THE COURT: Let me ask the government a question. Why  
3 isn't everything up to about the 8th are 10th of June Kovel  
4 privilege?

5 MR. LIGTENBERG: Your Honor, for this e-mail and the  
6 set the e-mails that we'll see shortly, it involves a separate  
7 tax issue with New York State, not with the IRS and --

8 THE COURT: You may have that understanding but I,  
9 certainly, can't tell that from reading this.

10 MR. LIGTENBERG: I think, your Honor, if we go to the  
11 very next one which is number 22 and I think in subsequent  
12 e-mails it becomes clear this is, A, a New York State issue  
13 and, B, involves entities other than First Star. Consistent  
14 with your findings of fact from Friday, Kovel is limited to  
15 issues with the IRS and issues with First Star, not New York  
16 state tax issues for other corporate entities.

17 THE COURT: Not New York state tax issues for other  
18 corporate entities. Hang on while I get my faith exhibit, the  
19 Kovel letter out.

20 MR. BRAFMAN: To amend 2012 requires you to look at  
21 the New York State tax liabilities. You can do it in a vacuum.

22 THE COURT: There's something to what Mr. Brafman  
23 says. I mean, that's why it seems to me that we have a bulk  
24 issue up until the decision is made and it was clearly made  
25 that there's going to be an amended tax return filed.

1                   MR. SOLOWIEJCZYK: Your Honor, if you turn to number  
2 22 which as far as I can tell involves the very same issues,  
3 you'll see that these are attached statements received from the  
4 New York Department of Tax a Finance and that they are hoping  
5 for assistance from the accountant in settling these lines.

6                   THE COURT: This one wouldn't fall under the Kovel  
7 privilege at all.

8                   MR. SOLOWIEJCZYK: I believe, your Honor, that --

9                   THE COURT: Mr. Ambrose isn't involved.

10                  MR. SOLOWIEJCZYK: -- involves these state tax issues.  
11 If you look back at number 20, these e-mails are sent within  
12 two hours of each other and I believe subsequent e-mails show  
13 that this e-mail chain in 20 involves the New York tax issues.

14                  If you also flip through after the e-mail on number  
15 22, you'll see that it's the consolidated statement of tax  
16 liabilities for INM Shell Service Station, Special Autocare  
17 Center. I don't believe First Star is listed on any of these.  
18 So this is clearly a separate state tax issue with New York  
19 State that fall outside of the scope of the Kovel.

20                  MR. BRAFMAN: Your Honor, if they try to introduce  
21 these tax liabilities at trial there would be a relevance of a  
22 403 argument anyway because he is not charged --

23                  THE COURT: Right. I'd leave them out. I wouldn't  
24 admit them.

25                  MR. BRAFMAN: Your Honor, in fairness when you are

1 developing a relationship with a new accountant and a lawyer  
2 and he is given the task of amending a tax return, you cannot  
3 amend the tax return without understanding where some of the  
4 money of First star Auto may have either come from or gone to.

5 THE COURT: Well, and I didn't make a reference to  
6 this because I decided it was not relevant in light of the  
7 literal language of the Kovel letter. But I do recall there is  
8 an e-mail that I saw that was introduced at the hearing in  
9 which Daniela Silva and Mr. Tsamulatis were discussing the fact  
10 that the reason that, the corporation in addition to First star  
11 that retained Mr. Tsamulatis separately "holdings" something or  
12 other, one of the separate retainer agreements. And the reason  
13 that that corporation had to file a tax return was because it  
14 had received money from First Star.

15 MR. BRAFMAN: Yes, judge. Money from First Star  
16 closed and therefore A and E would be irrelevant. So I don't  
17 know if the government is giving them away. But, B, in the  
18 beginning this relationship which is a couple of day, weeks  
19 after being retained and before the decision is made to file an  
20 amended return or a tax petition, you need to know the picture  
21 and this helps the accountant decide if amending the return is  
22 and Mr. Ambrose is amending the return is the right way to  
23 proceed.

24 And if you look at the next e-mail on May 21 which is  
25 Exhibit 23, you can see it immediately involves a discussion

1 with Paul who is Paul Ambrose recognizing that Tsamulatis and  
2 Ambrose need to get some guidance here or confer and come up  
3 with a game plan.

4 THE COURT: There's no way for me to know one way or  
5 another whether this played into the decision whether to file  
6 an amended tax return. Frankly, I intend to err on the Kovel  
7 issue. I intend to err on the side of excluding, not  
8 including. I think that's what I am supposed to do. And it  
9 does strike me that if these do have something to do with state  
10 tax issue, you are not prosecuting state -- you're not  
11 prosecuting anything. You're a tank team. But your buddies  
12 are not prosecuting any state tax issues and I wouldn't admit  
13 them in any event and you can tell them I said that.

14 Now I suppose it is entirely possible -- and this  
15 continues through 25 and 26. It's to discuss the New York  
16 State tax -- of liabilities. I am looking at 26 at the top to  
17 Mr. Issa and Ms. Vasquez from Mr. Ambrose with a copy to  
18 Mr. Tsamulatis.

19 Good morning, Tony. I will be available after three  
20 p.m. today to discuss New York statement of liabilities. You  
21 will need to note the alleged tax -- filed returns or estimated  
22 returns for failure to file. The taxes range from withholding  
23 sales, DOL and corp. True, it's all state tax issues. But I'm  
24 simply not able to break out the relevance of those to the  
25 ultimate decision to file a federal return and I'm not inclined

1 to since they are not relevant anyway, unless you can connect  
2 them to the federal return which I don't think is anybody's  
3 plan to do. I just don't see why I should waste my time  
4 agonizing over this when I can take the issue out of the case.

5 MR. LIGTENBERG: That's fine, your Honor.

6 THE COURT: One of my favorite things to do is to take  
7 issues out of the case.

8 MR. BRAFMAN: Mine too, judge. Thank you.

9 THE COURT: Well, I think it goes through 27 and 28.  
10 Most of which are I need to different time. When can we have  
11 this meeting? You know, I'm not available from two to six. We  
12 need to have a meeting.

13 MR. BRAFMAN: Right. So that's 28, 29.

14 THE COURT: Twenty-nine, 30 and we get to 30 and 30 is  
15 the First Star Auto 2012 corporate taxes.

16 MR. BRAFMAN: So that's clearly Kovel.

17 THE COURT: Right.

18 MR. LIGTENBERG: Your Honor, we agree that it falls  
19 within the scope of Kovel. Obviously, as mentioned earlier, we  
20 reserve the right to make a crime fraud argument.

21 THE COURT: Understood.

22 MR. BRAFMAN: Number 30 comes with an attachment.

23 THE COURT: It's the attachment that gives the crime  
24 fraud argument its heft.

25 MR. BRAFMAN: Correct. And if you are will note, the

1 third item on the attachment is First Star Auto. So it does --

2 THE COURT: The subject is First Star Auto. The  
3 subject of the e-mail is First Star Auto.

4 MR. BRAFMAN: I understand. But I think it supports  
5 your Honor's decision on the earlier e-mail because the statute  
6 includes First Star Auto Repair and it's clear the accountant  
7 is given the whole picture.

8 THE COURT: What's happened obviously, they started  
9 with a federal tax issue. This state tax issue then a month  
10 later reared its ugly head. They set up a meeting to talk  
11 about that. They added to the agenda of that meeting the  
12 federal tax. They probably talked about everything. I don't  
13 know. I wasn't there. But that meeting took place early in  
14 June and from and after that everything that Mr. Tsamulatis did  
15 was as an accountant and there's no evidence in front of me in  
16 connection with this hearing that we have last week that  
17 Mr. Ambrose ever gave any other legal advice in connection with  
18 First Star Auto's 2012 tax return.

19 MR. BRAFMAN: Yes. And I think if you look at Exhibit  
20 31 and the second page I believe it's clear that that is under  
21 Kovel. And I hope the government would consent because second  
22 page there is a reference in an e-mail where the lawyer, the  
23 defendant's agent and Mr. Ambrose are all discussing we need to  
24 discuss the best response.

25 THE COURT: Well, that's the essence of the findings

1 of fact. I saw that e-mail and I said they hadn't made a  
2 decision as of that point.

3 MR. BRAFMAN: Yes, your Honor.

4 MR. LIGTENBERG: Your Honor, in light of your Honor's  
5 ruling with regard to the state tax issues, we're willing to  
6 say at least through 35 falls within the code.

7 THE COURT: OK. Great.

8 MR. LIGTENBERG: Even with respect to 36, we agree  
9 that's within Kovel. We would likely be presenting a crime  
10 fraud argument.

11 THE COURT: You are reserving crime fraud arguments.  
12 You are reserving relevance arguments on behalf of the trial  
13 team for things that have nothing to do with the state taxes.  
14 None of those arguments is being forfeited. I think it's  
15 really important just to focus on Kovel.

16 MR. LIGTENBERG: Yes, your Honor.

17 MR. BRAFMAN: Then 36 should be suppressed as well.  
18 That's the returns. That's the IRS advice and reference to  
19 this loyalty. We agree not that it should be suppressed but  
20 that it falls --

21 THE COURT: Well, the answer is it will be suppressed  
22 unless it is otherwise admissible because the privilege doesn't  
23 count.

24 MR. BRAFMAN: Item 37 again, your Honor, this is the  
25 fourth decision and it references other companies but it also

1 references in the body of the e-mail the second paragraph, a  
2 strategy for First Star response to IRS 2012 notice which again  
3 points up why your Honor can't parse out what was being  
4 discussed by corporation corporation. And exercising  
5 discretion and just plain common sense indicates that they're  
6 looking at how to amend that they need to understand what's  
7 happening before they amend.

8 THE COURT: I told you that my preliminary read up to  
9 the date of that meeting and I don't know if the meeting can be  
10 established to say that the Kovel privilege attaches and that  
11 from and after that meeting it doesn't.

12 MR. BRAFMAN: OK. And I also then ask your Honor to  
13 move to 38.

14 THE COURT: Thirty-seven is obviously before that  
15 meeting because no decision has been made.

16 MR. BRAFMAN: Correct. And 38 is before that meeting  
17 because it's June 4 and if you --

18 THE COURT: Well, I don't know the date of the  
19 meeting. I only know it took place in first week of June.

20 MR. BRAFMAN: Your Honor's order indicates that we go  
21 up to June 10 because that's the first sign that you have --

22 THE COURT: That's first sign I had then.

23 MR. BRAFMAN: Right.

24 THE COURT: If I find out what the date of the meeting  
25 is, I may change the date.

1 MR. BRAFMAN: I understand.

2 Your Honor, 38 if you turnover to the -- I know the  
3 first page talks about hybrid corporate taxes but it's an  
4 e-mail chain that begins on the bottom of page two where --

5 THE COURT: Well, it's a repeat of 37. So we don't  
6 need to admit it and the rest of it has nothing to do with  
7 First Star Auto. So it doesn't fall within the Kovel  
8 privilege.

9 MR. BRAFMAN: But it does, judge, when you look at the  
10 return First Star gave a lot of money to hybrid. That's one of  
11 the problems in amending the return. And if you look at the  
12 bottom of page two, the same paragraph is continued that this  
13 is a strategy for the First Star response to IRS 2012 notice.  
14 This is a continuing conversation. This should all be really  
15 one exhibit. We've already agreed that 37 is under Kovel and  
16 37 and 38 is a continuing conversation.

17 THE COURT: There's so much repetition. There is so  
18 much redundancy in these exhibits. So many of them they're  
19 like four or five of them that have the June 3 e-mail where the  
20 Optimum Grocery Store stuff is in a bigger type font.

21 MR. BRAFMAN: You can't just --

22 THE COURT: Ah, the meeting this Thursday.

23 MR. BRAFMAN: There is a calendar entry.

24 THE COURT: The meeting took place on June 5.

25 MR. BRAFMAN: We put that into evidence, your Honor.

1                   THE COURT: OK. Fine.

2                   MR. BRAFMAN: Judge, there are e-mails after the  
3 meeting where they're still continuing to discuss the amended  
4 return.

5                   THE COURT: Well, discussing the amended return is  
6 different than discussing whether to file an amended return.

7                   MR. BRAFMAN: Your Honor, if you look at 63 --

8                   THE COURT: No. I don't want to. I want to go  
9 exhibit-by-exhibit. I don't want to go to 63.

10                  MR. BRAFMAN: The reason why I want you to go is to  
11 inform your decision as we proceed because you are stuck on the  
12 date of the meeting.

13                  THE COURT: The date of the meeting was June 5.

14                  MR. BRAFMAN: Yes. But what happened at that meeting?  
15 If you look at Exhibit 63, the first page, they're still  
16 discussing what is the update on First Cooperation taxes  
17 response.

18                  THE COURT: No. Sorry. I don't buy it. I don't buy  
19 it. A decision was made. It's clear from the e-mails that  
20 follow the June 5 meeting a decision was made to file an  
21 amended return.

22                  MR. BRAFMAN: Yes. But the materials continuing to be  
23 forward --

24                  THE COURT: They continued to be forwarded to him and  
25 I said everything that's forwarded to him then is in his

1 capacity as an accountant. It doesn't fall within Kovel.  
2 There is no lawyer on these e-mails. He is giving, he is being  
3 an accountant. He is preparing the amended tax return. And  
4 that activity does not fall within Kovel. Only the decision  
5 whether the strategy will be to file a tax an amended tax  
6 return or not falls within Kovel. That's legal advice.  
7 Preparing a tax return is not legal advice. I couldn't have  
8 been clearer about that.

9 MR. BRAFMAN: Yes. But if you look at Exhibit 70  
10 which is one of the last exhibits there is still discussion  
11 about whether or not the numbers are going to be decided prior  
12 to filing. Your Honor, the crime is not the decision to file.  
13 The crime is the return. And in this case Ambrose, Daniela and  
14 Chris are all discussing with Paul that the second response to  
15 the IRS, what are we going to do? How are we going to prepare  
16 the return? Their argument is that the return was prepared  
17 illegally. Our argument is the return was prepared.

18 THE COURT: Sorry. The due date is 8/17. They have  
19 been working on the return. You can tell from the e-mails.  
20 You can tell from Tsamulatis's testimony he started working on  
21 the return in the middle of June. So it did come out at the  
22 hearing that they sent the completed return to Mr. Ambrose for  
23 his review before it was filed. It did come out. So that  
24 doesn't mean that the work that was done prior to that date of  
25 filling out the return is Kovel privileged work. There may be

1 a question about whether there are one or two e-mails relating  
2 to Mr. Ambrose's review of the mere accountancy that was  
3 performed by Mr. Tsamulatis and maybe those are the e-mails  
4 that you are pointing to but that doesn't mean that  
5 everything -- I am not retreating from my decision that  
6 Mr. Tsamulatis's work in preparing the tax return was mere  
7 accountancy. You have your exception.

8 MR. BRAFMAN: Can I just add one comment, judge,  
9 because I think I know when I've lost an argument. I don't  
10 want to belabor it.

11 THE COURT: Of course you do.

12 MR. BRAFMAN: But I don't want to fight with you. I  
13 just want you to please recognize that the preparation of the  
14 return is not the crime that's being charged. It is the filing  
15 of the return. And the finalized return is not filed until  
16 after Ambrose and the accountant sign-off on the decision, not  
17 just to file it but to file this return.

18 THE COURT: Sorry. Save it for the circuit.

19 MR. BRAFMAN: OK. Well, they have to convict him  
20 before we get to the circuit.

21 THE COURT: That's true. I always say if you are  
22 unlucky enough to be there, you have this argument.

23 MR. BRAFMAN: Thank you, judge.

24 Your Honor, I'll have you agree that number 39 is  
25 under the Kovel because that clearly is referenced to the

1 second letter than June 4.

2 MR. LIGTENBERG: We agree on 39.

3 THE COURT: Fine.

4 MR. BRAFMAN: Forty then would fall under the same.

5 THE COURT: It's the same e-mail over and over and  
6 over again. Fort is purely redundant.

7 MR. BRAFMAN: And 41, as well.

8 MR. LIGTENBERG: Yes, we agree, your Honor.

9 MR. BRAFMAN: And 42 is a follow-up and it is now on  
10 June 14.

11 THE COURT: Forty-two is June 10.

12 MR. BRAFMAN: Sorry. June 10, yes, your Honor.

13 THE COURT: From Daniela to Paul Ambrose.

14 MR. BRAFMAN: That falls within the time period  
15 covered by your Honor's ruling.

16 THE COURT: Well, except look at what the -- it's  
17 Ibrahim Issa taxes paid 2010 PDF, untitled attachment, Ibrahim  
18 Issa taxes paid 2010, untitled attachment.

19 MR. BRAFMAN: I'll withdraw this exhibit but I reserve  
20 my argument on relevance because it's got nothing do with the  
21 crimes charged.

22 THE COURT: This is purely relating to state matters  
23 and Mr. Issa's personal taxes and that is not comprehensible  
24 within the Kovel letter. I am holding this lawyer, this very  
25 fine lawyer, even tax lawyers have to be precise in their

1 language.

2 MR. LIGTENBERG: Your Honor, the government thinks we  
3 can just stop right here given the meeting was on June 5 and  
4 this is in chronological order. Everything here post dates the  
5 decision to file an amended return. So we think everything  
6 from here on out is pure accountancy consistent with your  
7 Honor's findings of fact.

8 MR. BRAFMAN: But, your Honor, to be candid, your  
9 Honor, I think arbitrarily cutting this off when you look at  
10 June 10, the e-mail behind 43 --

11 THE COURT: Yes, I know. I am looking at the one at  
12 the bottom of the page, it's to Chris from Daniela.  
13 Mr. Ambrose was copied and Tony asks Chris to call him about  
14 money he's transferred to other corporations.

15 There is no indication that Paul is going to be  
16 involved in that. I don't see that that is Kovel privilege.

17 MR. BRAFMAN: Your Honor, the subject matter is First  
18 Star 2012 tax return.

19 THE COURT: We are at a point when the decision has  
20 been made to file an amended tax return. It's my finding based  
21 on the evidence that I heard that that decision was made at 9  
22 June 5 meeting.

23 MR. BRAFMAN: But they're talking about the exact  
24 numbers coming from client to his accountant who he has a good  
25 faith basis to believe is under Mr. Ambrose privilege. At that

1 point a bell does not go off and say, Mr. Issa, you are on your  
2 own.

3 THE COURT: But that's too bad, isn't it? The  
4 privilege doesn't last as long as Mr. Issa thinks it lasts.  
5 Privilege lasts only in connection with the kind of work and  
6 I'm sure Mr. Issa wasn't up on the law on this. Frankly, I  
7 wasn't until very recently. The kind of work that's being  
8 done, even if Mr. Ambrose tries to make it privileged. It's a  
9 certain kind of work. It's not privileged. Even that work is  
10 mere accountancy and that's what this is.

11 MR. BRAFMAN: Kovel accountants are doing mere  
12 accountancy. They're working under an attorney.

13 THE COURT: The point is their work is privileged only  
14 when they are giving advice to the attorney so that he can give  
15 advice to the client.

16 MR. BRAFMAN: Yes.

17 THE COURT: The advice I find -- and I'm saying this  
18 for the last time and we're not going to discuss it again --  
19 was given at a meeting on June 4 when a decision was made. I  
20 actually think was made a lot earlier but I am going to say it  
21 was made on June 4. A decision was made that the corporation  
22 First Star, the only taxpayer covered by the Kovel letter would  
23 file an amended return. From and after that time there was no  
24 evidence before me at the hearing and I see no evidence in this  
25 e-mail that Mr. Ambrose was asked for his legal advice.

1                   MR. BRAFMAN: But, your Honor, he is providing numbers  
2 that go into the return.

3                   THE COURT: Sorry. You've got your exception. I am  
4 not going to discuss it any more.

5                   MR. BRAFMAN: All right. So I have to, you know, do I  
6 have to go through these or do I have an exception?

7                   THE COURT: You have an exception. I think we are  
8 done. The rest of them are not going to come in under Kovel  
9 except if you have some e-mails from at or about the time when  
10 Mr. Ambrose you know, that Mr. Ambrose was asked to review the  
11 tax return that was prepared by Mr. Tsamulatis. We know he was  
12 asked to look at it before it was sent in to the IRS. That  
13 happened in the middle of August. So there may be some e-mails  
14 that are privileged in that time period. I don't think. I  
15 don't know if you can point them out to me.

16                  MR. BRAFMAN: May I just have a moment?

17                  THE COURT: Sure. Jim says I misspoke. Would be  
18 excluded pursuant to Kovel. Never mind. Just forget that.  
19 Strike that. I don't know what I said. I'm not going to unsay  
20 it and resay it. I've said it enough times.

21                  (Pause)

22                  MR. BRAFMAN: Your Honor, if I can please look at  
23 Exhibit 63. That's in August and that's from Mr. Issa and it  
24 relates to corporate tax returns and one is the update of First  
25 Star corporate taxes and then there is an attachment which is

1 all of the financial information that Mr. Tsamulatis is  
2 submitting. I'm sorry. Has gotten from the client for the  
3 preparation of --

4 THE COURT: No. Nice try.

5 MR. BRAFMAN: Your Honor, number 69 on the bottom it  
6 is estate continuation of e-mail chain discussion with  
7 Mr. Ambrose is specifically referenced on the bottom of that  
8 exhibit.

9 THE COURT: Right.

10 MR. BRAFMAN: And it's whether or not to amend the  
11 return.

12 THE COURT: No. They don't have to file a petition in  
13 tax court.

14 MR. BRAFMAN: It's important that we go over the  
15 numbers prior to filing. All together means Ambrose too. How  
16 is that not privilege. Even if the decision was made to file  
17 the return, there is a discussion among counsel and the  
18 accountant.

19 THE COURT: I just said to you five minutes ago, I am  
20 sure there are some e-mails as to which you will want to,  
21 attorney/client privilege.

22 MR. BRAFMAN: This is it.

23 THE COURT: Because Mr. Ambrose testified that he was  
24 sent the return, the fact that he was sent the return and asked  
25 to look at it before it was filed, does not make the work that

1 was done in the intervening two months anything other than mere  
2 accountancy but. His review of those numbers is clearly  
3 attorney/client privilege. I don't deny that. I don't think  
4 the government defies that.

5 MR. BRAFMAN: So are we then agreeing on 69 as being  
6 either under Kovel or just privilege? And you have to look at  
7 70 well?

8 THE COURT: The e-mail that would be attorney/client  
9 privilege which is also the only e-mail that's not somewhere in  
10 some other chain of e-mails is the e-mail at the bottom of the  
11 first page from set CPA to Daniela with a copy to Paul Ambrose,  
12 that's one e-mail, is the only one that would fall under a  
13 potential. It's actually an attorney client privilege.

14 MR. BRAFMAN: Then that's the same e-mail in the  
15 Exhibit 70, judge. It just carries forward.

16 THE COURT: No, 70 is, hi, Chris. Tony wants to go  
17 over the numbers with you first before we meet with Paul. OK?  
18 Tony and Chris going over the numbers is not Kovel privilege  
19 because it relates to the mere accountancy work that was done  
20 by Chris.

21 MR. BRAFMAN: But the privileged e-mail is right below  
22 that. That's what they're responding to.

23 THE COURT: "OK. Thank you?" Oh, any place that we  
24 find the "I just spoke with Paul" e-mail, it can be redacted.  
25 All right?

1 MR. BRAFMAN: Yes, your Honor.

2 Your Honor, those are the materials without waiving  
3 our --

4 THE COURT: You waived no objections.

5 MR. BRAFMAN: Thank you, judge.

6 THE COURT: All right. So really by the end of the  
7 day it seems to me that the government should advise  
8 Mr. Brafman and his team of which e-mails it would say fell  
9 within the crime fraud exception. So that he has something to  
10 punch at. And if I can get I guess simultaneous briefs from  
11 both sides about why those fall within the crime fraud  
12 exception or why they don't fall within the crime fraud  
13 exception.

14 MR. BRAFMAN: Your Honor, could we --

15 THE COURT: And it's a holiday.

16 MR. BRAFMAN: But could we do it so that we get at  
17 least the morning tomorrow to respond? Otherwise, we may be  
18 talking about --

19 THE COURT: I was talking about next Monday.

20 MR. BRAFMAN: I'm sorry. Yes. That's fine.

21 THE COURT: It's a holiday this week, Mr. Brafman.

22 MR. BRAFMAN: I know that, judge.

23 THE COURT: I actually think people should take the  
24 holiday.

25 MR. BRAFMAN: So the government is going to address

1 which e-mails?

2 THE COURT: Yes. They can tell you that tomorrow  
3 early tomorrow.

4 MR. BRAFMAN: Then we can respond by -- we had a  
5 pretrial conference scheduled but I think we've agreed on  
6 consent and I think your Honor has scheduled it for Monday at  
7 10:30. Is that correct, your Honor?

8 THE COURT: I don't know. Did we?

9 MR. BRAFMAN: A final pretrial conference.

10 COURTROOM DEPUTY: Yes.

11 THE COURT: So I'll get briefs. It'll be a useless  
12 conference. Make it Wednesday, the final pretrial conference  
13 at ten o'clock. Monday submit briefs. I don't want to have an  
14 argument when I haven't read the papers. I just don't want to  
15 do that. Frankly, I'm not going to be here this weekend.

16 COURTROOM DEPUTY: The final pretrial conference is  
17 now Wednesday the 5th.

18 THE COURT: You are looking at the wrong date. It's  
19 the 29th of November.

20 MR. BRAFMAN: This is the final pretrial conference?

21 THE COURT: At which time I will make a decision on  
22 the crime fraud.

23 COURTROOM DEPUTY: Wednesday, the 28th at ten o'clock.

24 THE COURT: And at that moment I will make a decision  
25 on the crime fraud exception.

1 MR. BRAFMAN: Twenty-eighth at ten o'clock, nothing on  
2 Monday.

3 THE COURT: Except you are going to send me a brief.

4 MR. BRAFMAN: Yes, ma'am. And have a happy holiday.

5 MR. LIGTENBERG: When are the briefs due?

6 THE COURT: Monday.

7 MR. LIGTENBERG: What time?

8 THE COURT: Let's say by noon.

9 MR. LIGTENBERG: Thank you, your Honor.

10 MR. BRAFMAN: I thought we were going to be responding  
11 to the government.

12 THE COURT: I said simultaneous briefs.

13 MR. BRAFMAN: Your Honor, we will also I think by  
14 Monday be filing a motion to dismiss certain counts of the  
15 indictment just predicated on our view of what happened in the  
16 grand jury.

17 THE COURT: Well, I will rule on no motion addressed  
18 to the grand jury without reading what happened in the jury.  
19 So since you are going to make that motion the government  
20 should bring the grand jury minutes.

21 MR. BRAFMAN: Thank you, judge.

22 THE COURT: I said I feel like a state court judge.

23 MR. BRAFMAN: I know it burdens the Court, but to be  
24 honest with you, it's one of the advantages in state court  
25 where at times the prosecutors has to be a little bit more

1 careful knowing it's going to be reviewed. No disrespect to  
2 anyone in the courtroom, but I have found that that notion in  
3 state court helps that process.

4 THE COURT: I don't disagree with you.

5 MR. BRAFMAN: Try my best.

6 THE COURT: There are many things about state court  
7 that oddly I think make a great deal of sense.

8 MR. LIGTENBERG: Your Honor, just to clarify, when  
9 would you like the government to have the grand jury minutes?

10 THE COURT: ASAP.

11 MR. LIGTENBERG: Thank you, your Honor.

12 MR. BRAFMAN: I think the non tank team promised a  
13 list of witnesses sometime late today.

14 THE COURT: OK. Thank you all.

15 (Adjourned)

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